

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

(San Francisco, California)

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 101, AFL-CIO, CLC, 1/

Employer

and

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 265-CEMETARY WORKERS AND GREEN
ATTENDANTS, AFL-CIO, CLC, 2/

Petitioner

20-RC-17811**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, 3/ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 4/
3. The labor organization(s) involved claim(s) to represent certain employees of the Employer. 5/
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. 6/
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: 7/

All full-time and regular part-time union representatives, senior union representatives, special projects union representatives, and organizers employed by the Employer; excluding executive board members, managerial employees, clerical employees, confidential employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll

OVER

period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Service Employees International Union, Local 265-Cemetery Workers and Green Attendants AFL-CIO, CLC**.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB. Wyman-Gordan Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. **North Macon Health Care Facility**, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before February 7, 2003. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by February 14, 2003.

Dated January 31, 2003

at San Francisco, California

/s/ Robert H. Miller
Regional Director, Region 20

- 1/ The Employer's name appears as amended at the hearing.
- 2/ The Petitioner's name appears as amended at the hearing.
- 3/ The transcript is corrected as follows: On page 158 line 13, the words "Joint Exhibit 3" is corrected to read "Employer Exhibit 3".
- 4/ While the Board has not established a jurisdictional standard for labor organizations acting as employers, in asserting jurisdiction the Board has relied on gross revenues, per capita taxes to international unions across state lines and payments across state lines to and from the international unions. See Variety Artists (Golden Triangle Restaurant), 155 NLRB 1020 (1965); Oregon Teamsters' Security Plan Office, 119 NLRB 207 (1958); Laundry Workers Local 26, 129 NLRB 1446 (1961). The parties stipulated and the record reflects that the Employer is a labor organization with an office and place of business in San Francisco, California, where it represents employees in bargaining with employers. During the calendar year ending December 31, 2002, the Employer derived gross revenues in excess of \$1,000,000 and purchased goods and/or services valued in excess of \$50,000 directly from points located outside the State of California. In these circumstances, I find, that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.
- 5/ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.
- 6/ The record reflects that from at least April 1, 1993, until August 27, 2002, the Federation of Agents and International Representatives, herein called FAIR, represented the Employer's employees who are the subject of the instant petition. On August 27, 2002, FAIR disclaimed interest in representing that unit. FAIR did not intervene in this proceeding. The parties stipulated, and I find, that there is no contract bar to this proceeding.
- 7/ The parties stipulated, and the record reflects, that Michael Borstel, the Employer's President, and Jason Escovido, the Employer's Secretary-Treasurer, have the authority to formulate and effectuate the Employer's policies and procedures relating and pertaining to the employees in the petitioned for unit. As such, I find that Borstel and Escovido are excluded from the unit as managerial employees. The record also reflects that Borstel has authority to hire and fire employees in the petitioned for unit and has exercised that authority. As such, I find that Borstel also is excluded from the unit as a statutory supervisor.

The Petitioner seeks to represent a unit comprised of all regular full-time and regular part-time union representatives, special project union representatives,

and organizers employed by the Employer; excluding all executive board officers and members, managerial employees, supervisors, clericals, confidential employees and guards as defined in the Act. The Petitioner contends that the six union representatives who also are members of the Employer's Executive Board should be excluded from the unit as managerial and confidential employees, and that the two senior union representatives also should be excluded as statutory supervisors. The Employer takes the contrary view. As discussed below, I find that the six union business representatives who also are members of the Employer's Executive Board are managerial employees and, therefore, should be excluded from the unit. I also find that the senior business representatives are not statutory supervisors and will not be excluded on that basis.

The record reflects that the Employer was created in about 1992 as a result of several mergers of other sister local unions of United Food and Commercial Workers Union. The Employer represents employees in the retail business in Northern California, and has offices in South San Francisco, San Francisco, Novato, Santa Rosa, and Eureka. The parties stipulated that Union Representatives Robert Ferrario, Virginia Ingelfinger, Kurt Rothenbuescher, Gary Feliciano, Michael Jones, Keith Vuckson, and Frederick Pepper, Jr., Senior Union Representative Ernest Behm, and Special Projects Union Representatives Steven Ardito and Virginia Galindo properly belong in the proposed bargaining unit.

The disputed individuals, who also are members of the Employer's Executive Board, are Union Representatives Keith Mazini, Dustin Tyssen, John Ulrich, and John Rossi, and Senior Union Representatives Diane Holland and Maureen McManus. Holland's position on the Employer's Executive Board is that of Recorder, which also is referred to as Recording Secretary. Holland and McManus are the two Senior Business Representatives whom the Petitioner contends should be excluded from the unit on the basis that they are statutory supervisors. In addition, Union Representative Jacinto "Ray" Mendoza is in charge of the Employer's organizing projects. The parties agreed that the issue of whether Mendoza should be included in the unit would be left to the challenge procedure.

Managerial Status Of Union Representatives On The Employer's Executive Board:

Collective-Bargaining History: The record contains a collective-bargaining agreement between the Employer and FAIR effective for the period from April 1, 1993, through September 30, 1995. That collective-bargaining agreement excludes the Executive Board members from the unit. Thus, Article 1, Recognition and Bargaining Unit, of that agreement, defined the unit as follows:

All full-time and regular part-time Business Representatives
and Organizers excluding the President, Secretary-Treasurer,

the Executive Board members, office clerical employees, members of the Executive Committee, guards and supervisors as defined by the Act and all other employees.

Notwithstanding the provision of the collective-bargaining agreement excluding Executive Board members from the unit, the record contains evidence that prior to 1998, when Daniel Earls became the Employer's President, at least some of the Employer's union representatives paid dues to, and were represented by FAIR. The record also contains evidence that when Earls became President on about October 1, 1998, he immediately terminated a number of union representatives, some of whom also were members of the Employer's Executive Board. They grieved their terminations. The arbitrator declined to order reinstatement for the union representatives who were also members of the Employer's Executive Board. After Borstel became President on October 1, 2001, he and Fair negotiated a settlement of numerous unfair labor practice charges and related civil litigation. Borstel testified that it was FAIR's position that the union representatives who were members of the Executive Board should be included in the unit and covered by the collective-bargaining agreement. The Employer agreed. This agreement was memorialized in a Memorandum of Understanding ("MOU") signed by the parties on November 1, 2001. This MOU stated that "Notwithstanding, [sic] arbitrator McKay's Award in the FAIR grievance over the October 2, 1998, terminations, Executive Board members employed as union representative [sic] or organizers shall be covered by the CBA[.]"

The Employer's Organization Structure, Constitution, And By-Laws: The Employer's Executive Board consists of the President, Secretary-Treasurer, Recorder, and between 12 and 18 Vice Presidents. The current President is Michael Borstel, and the current Secretary-Treasurer is Jason Escovido. Diane Holland, one of the six disputed Union Representatives, is the current Recorder, and thus is an officer of the Executive Board. The other five disputed union representatives are members of the Executive Board, holding the title of Vice President. All of the members of the Executive Board and the Employer's union representatives must be members of the Employer. The Employer's Bylaws provide that no more than 50% of the Executive Board can be comprised of regular employees of the Employer.

The Employer's Bylaws also state, in relevant part, that: "The duties of the Executive Board shall be those provided in the International Constitution and these bylaws and such other duties as may be provided by the Local Union from time to time." Both the Employer's Bylaws and the International Constitution state, in relevant part, that the Local Union Executive Board "shall have full and complete charge of all business of the Local Union not otherwise delegated to a specific officer or officers, or reserved to the membership."

Both the Employer's Bylaws and the International Constitution state that "[t]he President shall be the chief executive officer of the Local Union and . . . shall have general supervision over the affairs of the Local Union." The International Constitution and the Employer's Bylaws have similar provisions granting certain authority to the Employer's Officers and/or Executive Board. Thus, the International Constitution states as follows:

- "The President shall have the authority to interpret the bylaws of the Local Union, subject to an appeal to the Local Union Executive Board,"
- "The President shall disburse the Local Union's funds and, except for disbursements required to be made from the funds of the Local Union by the Constitution or laws of the International Union or the approved bylaws of the Local Union, disbursements shall be authorized or ratified by the Local Union Executive Board. . . . The President shall invest and reinvest the surplus funds of the Local Union, upon the approval of the Local Union Executive Board according to standards applicable to fiduciaries." (Emphasis added.)
- "The Local Union President may employ or retain such personnel as may be necessary to conduct the affairs of the Local Union. The Local Union President may terminate the employment of any such person at the end of an assignment or in the best interest of the Local Union; except that the Local Union President may terminate the employment of any Business Representative for reasonable cause, subject to an appeal to the Local Union Executive Board and such further appeal as may be provided in the Local Union's bylaws, provided that there is no other grievance procedure authorized by the Local Union." (Emphasis added.) [The Employer's Bylaws do not contain the language "and such further appeal as may be provided in the Local Union's bylaws, provided that there is no other grievance procedure authorized by the Local Union." Rather, following the language that the "President may terminate the employment of any Business Representative for reasonable cause, subject to an appeal to the Local Union Executive Board[.]" the Bylaws state that "[i]n the event the Business Representative is not satisfied with the decision of the Local Union Executive Board, he or she shall have the right to proceed to arbitration respecting the issue of his or her termination."]
- "The Local Union President shall determine the compensation and expenses, or expense policy, for all personnel employed or retained by the Local Union, subject to the approval of the Local Union Executive Board." (Emphasis added.)

- “The Secretary-Treasurer of the Local Union shall assist the President in the carrying out of the President’s duties and responsibilities and shall conduct the Secretary-Treasurer’s office under the general supervision of the President.”
- “The Vice Presidents shall assist the President in the discharge of the President’s official duties.”
- “The Recorder of each Local Union shall report the minutes of each Local Union membership and Executive Board meeting,”
- “Compensation and expenses, or the expense policy, for Local Union officers shall be established by the Local Union Executive Board with such further approval as may be required by the Local Union’s bylaws.” (Emphasis added.) [The Employer’s Bylaws state that “[s]alaries and expenses of officers shall be established by the Local Union Executive Board.]
- Although the Employer’s membership votes for the officers and members of the Executive Board for three-year terms, the Local Union Executive Board fills all vacancies in any of the elected offices of the Local Union, including President and Secretary-Treasurer, for the balance of those terms.
- The Employer’s Executive Board hears internal charges brought against its members. The Executive Board sets the penalties for members who are found guilty, and such penalties can include expulsion from membership. In certain circumstances, the International Union can establish a trial board made up of members from outside the Local Union to conduct the trial.

In addition, the Employer’s Bylaws provide that if a member disagrees with the President’s disposition of the member’s grievance, the member has the right to appeal that decision to the Employer’s Executive Board.

Authority And Duties Of The Employer’s President And Executive Board In Practice:

The record contains evidence that Union President Michael Borstel, without the approval of the Executive Board, has general authority to manage most of the affairs of the Employer. Thus, he has, without approval from the Executive Board, hired and laid off union representatives and clerical employees, directed litigation, formulated collective-bargaining proposals, and changed the title of the position of Director to that of Senior Union

Representative. In addition, after being elected President in 2001, Borstel negotiated the MOU with FAIR to resolve outstanding NLRB changes and related civil litigation without the Executive Board's approval to settle these matters, although he submitted the economic portion of the MOU to the Board for approval, as discussed below. Borstel also negotiated a collective-bargaining agreement with the Office of Professional Employees International Union ("OPEIU"), Local 3, covering the Employer's clerical workers without obtaining approval for the terms of that agreement except, as discussed below, the wage and benefit portions. Similarly, when FAIR disclaimed interest on August 27, 2002, Borstel created and implemented new policies and procedures for the business agents. As part of these policies, which Borstel distributed to the union representatives in meetings in October and November, 2002, he established greater authority in the office of President to assign and direct the union representatives, including the provisions that the President assigns the union representatives to work on organizing drives and political activities, and that "[r]epresentatives will work under the direct supervision of the President." As part of this reorganization, Borstel also eliminated the title of Director, which a few of the union representatives had held in certain offices, converted those positions to Senior Union Representatives, and removed any supervisory authority that the Directors previously might have had. Although Borstel submitted the wage and benefit portions of his new policies to the Executive Board, he did not submit to the Executive Board for approval the rest of these policies.

As quoted above, the Executive Board has authority to approve or ratify expenditures. The Executive Board approves or ratifies most expenses at its monthly meetings after they have been paid. Thus, Borstel does not obtain advance approval from the Executive Board for such things as spending money on the day-to-day operations of the Employer, hiring attorneys, and engaging in litigation. Rather, most of the decisions that the Executive Board makes in advance of the expenditures involve such expenses as donations to charities, retirement functions, use of strike funds, whether to send representatives to conventions, etc.

On the other hand, there are significant circumstances where the Executive Board approves expenses before they can go into effect. The record contains evidence that Borstel submits expenditures involving staff salaries and expenses to the Executive Board for approval. Thus, as discussed above, when Borstel negotiated the clerical collective-bargaining agreement with OPEIU, Local 3, he submitted the wage and benefit portion to the Executive Board for approval. In addition, the record reflects that the Executive Board approved the wages and compensation package in the prior OPEIU, Local 3, agreement in 1998. With regard to the union representatives, if FAIR had not disclaimed interest, Borstel testified that he would have submitted the wage and benefit portion from any negotiated collective-bargaining agreement to

the Executive Board for approval. After FAIR disclaimed interest and Borstel created his own policies and procedures for the union representatives in the fall of 2002, he submitted the wage and benefit portions to the Executive Board for approval. In view of the Executive Board's authority to authorize or ratify disbursements and to determine the compensation and expenses for all staff, those economic provisions could not have gone into effect without the Executive Board's approval.

There is evidence in the record that in some of these situations, the Executive Board members who also are union representatives voluntarily chose not to vote on issues affecting themselves, such as the wages and benefits contained in the new policies and procedures that Borstel implemented in October 2002. Borstel, however, testified that he did not recall if they had refrained from voting on the MOU. Similarly, when then-President Dan Earls demoted Borstel, who at the time was a union representative or Director, and lowered his salary, Borstel appealed both decisions to the Executive Board. Although the Board did not reverse his demotion, it did restore his pay. Borstel testified that he did not recall if the union representatives on the Executive Board voted on his appeal.

In any case, there is no requirement that Executive Board members refrain from voting on such wage and compensation packages that affect them as union representatives, or that affect the clerical employees of the Employer. Under the International's Constitution and the Employer's Bylaws, the union representatives and senior union representatives who sit on the Executive Board clearly have the right to vote on such issues.

Regarding the Executive Board's role in the termination of union representatives, the record reflects that when Dan Earls terminated a number of union representatives immediately after his election in 1998, those terminated employees appealed to the Executive Board. The Board voted not to hear their appeal. Although Mike Borstel has terminated at least one union representative, no appeal was filed. Under the Employer's Bylaws, if an appeal had been filed, the Executive Board would have had the authority to reverse Borstel's decision and reinstate the employee. As with the Executive Board's authority regarding approval of wages and compensation, there is no requirement that an Executive Board member who also is a union representative refrain from voting on such personnel matters. Borstel also has terminated clerical employees, but they do not have the right to appeal to the Executive Board.

With regard to the Executive Board's role in general policies of the Employer, the Executive Board does not get involved in the decision of whether to arbitrate a member's grievance unless the member appeals the Employer's decision not to arbitrate. The record reflects one situation when the Executive

Board reversed the decision of the secretary-treasurer under Dan Earls not to arbitrate a grievance. In addition, when the employees at Safeway failed to ratify the proposed collective-bargaining agreement but did not authorize a strike vote, the Employer's Executive Board, in conjunction with the executive boards of other UFCW local unions who were involved in those negotiations, voted to ratify the agreement.

Borstel testified that Vice President Jason Escovido is involved in assisting Borstel in creating such policies. The record reflects, for example, that Escovido was involved in Borstel's decision to terminate a union representative in the summer of 2002 and to lay off a clerical employee, in the creation of the new policies and procedures for the union representatives in October 2002, in Borstel's negotiation of the clerical collective-bargaining agreement with OPEIU, Local 3, and in developing the Employer's negotiating strategies with employers. Escovido was elected to his position in April 2002 by the Executive Board to fill a vacancy in that position. As discussed above, pursuant to the International Constitution and the Employer's Bylaws, the Executive Board can fill vacancies in the position of President and Vice-President.

Supervisory Status Of Senior Union Representatives:

The Petitioner contends that Senior Union Representatives Diane Holland and Maureen McManus are supervisors within the meaning of Section 2(11) of the Act. The Employer contends otherwise. Both Holland and McManus were Directors in their respective offices before Borstel eliminated that position and created the new position of Senior Union Representative in October 2002. The record reflects that Borstel made these changes to make it clear that he was in charge of the Employer's affairs. Although prior President Earls had given the Directors more authority in directing and assigning the union representatives in the field, Borstel did not transfer that authority to the newly created position of Senior Union Representative. Rather, Borstel returned any supervisory authority that the Directors had held back to the office of President. Borstel testified that he uses the senior union representatives as conduits between himself and the other union representatives in the field, and that they act more like lead people. The record also reflects that Borstel makes all job assignments for the union representatives and senior union representatives, although there are times when the representatives agree to help each other out on a matter.

The record reflects that the senior union representatives, like the other union representatives, have routes and perform typical union business agent functions of servicing the membership, enforcing collective-bargaining agreements, and investigating and pursuing grievances. The record also reflects that while the representatives have a great deal of autonomy, they often collaborate with each other on issues such as grievance handling. As stated above, the senior union representatives also act as conduits between Borstel and the other union

representatives. Holland's duties also include various political activities, including working with various labor councils and lobbying the San Francisco Board of Supervisors and in Sacramento, as well as coordinating projects with other unions. Union Representative John Ulrich, who works in the Employer's Eureka office, also performs political functions.

The senior union representatives have super seniority in their offices and receive \$30 a week more in pay than do most of the other union representatives. Union Representative Kurt Rothenbuescher, who works out of the South San Francisco office, however, also receives an additional \$30 a week because he is the Grievance Coordinator for south of the Golden Gate Bridge. McManus, in addition to being a Senior Business Representative, also is the Grievance Coordinator for north of the Golden Gate Bridge, but she does not receive an additional premium for this extra job duty. In addition, the record reflects that under Borstel's new policies and procedures Holland, as the Senior Union Representative, receives an automobile allowance, but Union Representatives Gary Feliciano and Michael Jones in the same office do not receive that allowance.

Gary Feliciano and Michael Jones testified that Diane Holland, the Senior Union Representative in the San Francisco office where they all work, gives them instructions and assigns them work. For example, Jones testified that Holland asked him to help on the Levi-Strauss contract, and Feliciano testified that Holland told him to handle a grievance at Standard 5 & 10, as well as the contract negotiations at Standard 5 & 10 and Center Hardware. On the other hand, Holland and Borstel testified that Borstel made the decisions as to who should perform these tasks, and her role was to pass these decisions on to Jones and Feliciano. Moreover, while there was evidence of collaboration among the representatives as to filing of grievances, moving grievances to mediation or arbitration, etc., there is no evidence that Holland or McManus directed or assigned the other union representatives in their work. The record also reflects that once Borstel implemented his new policies and procedures in the fall of 2002, only he had the authority to approve vacations, sick leave, and other days off. While the union representatives in an office may run their proposed vacation dates by each other and the senior union representative to see if there are any conflicts, only Borstel has the authority to approve such requests.

As to McManus' alleged supervisory status, Union Representative Kevin Vuckson testified that McManus asked the union representatives in the Novato office to meet on a regular basis, she changed the color for the file folders for grievances, the grievance form was changed, and she asked him to announce when he left the office. Vuckson also testified that he has been asked to fill in for McManus on grievances, but that is a common practice common among the staff. Vuckson also testified that on a big issue, he would consult with the other union business representatives in the Novato office as well as McManus, but that Vuckson would look to Mike Borstel on how to handle such a problem.

Analysis: Supervisory Status Of Senior Union Representatives:

The term “supervisor” is defined in Section 2(11) of the Act as:

“[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

An individual who possesses any one of the supervisory indicia listed in Section 2(11) of the Act will be deemed to be a supervisor only if the authority is exercised with independent judgment on behalf of the employer and not in a routine manner. Bowne of Houston, Inc., 280 NLRB 1222, 1223 (1986). An individual who exercises some “supervisory authority” only in a routine, clerical, perfunctory, or sporadic manner will not be found to be a supervisor. Id. In addition, leadmen and other “minor supervisors” are not necessarily statutory supervisors. George C. Foss Co., 270 NLRB 232, 234 (1984), *enfd.* 752 F.2d 1407 (9th Cir. 1985). In determining whether an individual is a supervisor, the Board has a duty to employees not to construe supervisory status too broadly because the employee who is found to be a supervisor is denied the employee rights that are protected under the Act. Hydro Conduit Corp., 254 NLRB 433, 437 (1981). The burden of proving that an individual is a supervisor rests on the party alleging such status. Tucson Gas & Electric Company, 241 NLRB 181 (1979).

Based on the foregoing facts, I find that the Petitioner has failed to establish that Senior Business Representatives Holland or McManus are statutory supervisors. The evidence does not establish that they assign the union representatives or responsibly direct them. While the Holland and McManus may convey instructions from Borstel, that does not constitute responsible direction as required by the Act. Nor does the record reflect that Holland or McManus possess any other statutory indicia. For example, they are not involved in hiring, firing, disciplining, or adjusting grievances of the union representatives, or any of the other supervisory indicia. These functions are all performed by Borstel. In addition, at least since October 2002, when Borstel implemented his policies and procedures, all requests for vacations, sick leave, and other days off must be approved by him.

With regard to Ernest Behm, Petitioner stipulated both at the beginning and end of the hearing that Behm was properly included in the bargaining unit, notwithstanding the fact that evidence had developed that Behm was a Senior Business Representative. In its brief, Petitioner now notes that it had serious questions about

the status of Behm but was not prepared to go forward with evidence at the hearing, and therefore reserved the right to challenge him if necessary. When Borstel implemented the policies and procedures in October 2002, and changed the position of Director to that of Senior Business Representative, he chose to remove from the Senior Business Representative position whatever supervisory authority the Directors might have possessed. These policies and procedures applied equally to all of the senior business representatives, including Behm. In these circumstances, and for the reasons noted above, I find that Behm is not a statutory supervisor.

Managerial Status Of Union Representatives On The Employer's Executive Board:

As noted above, the Petitioner would exclude Executive Board Members Diane Holland, Maureen McManus, Keith Mazini, Dustin Tyssen, John Ulrich, and John Rossi from the unit on the basis that they are managerial employees under the Act.

Although the Act makes no specific provision for “managerial employees “ under Board policy, this category of personnel has been excluded from the protection of the Act. See Ladies Garment workers v. NLRB, 339 F.2d 116, 123 (2d Cir. 1964); Ford Motor Co., 66 NLRB 1317 (1946); Palace Dry Cleaning Corp., 75 NLRB 320 (1948); Palace Dry Cleaning Corp., 75 NLRB 320 (1948).

“Managerial employees” are defined as employees who have the authority to formulate, determine, or effectuate employer policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer’s established policies. Tops Club, Inc., 238 NLRB 928, fn2 (1978), quoting Bell Aerospace, 219 NLRB 384 (1975), on remand from the Supreme Court’s Decision 416 YU.S. 267 (1974)

In NLRB v. Yeshiva University, 444 U.S. 672 (1980), the Supreme Court described managerial employees as follows:

Managerial employees are defined as those who “formulate management policies by expressing and making operative the decisions of their employer.” These employees are “much higher in the managerial structure” than those explicitly mentioned by Congress which “regarded [them] as so clearly outside the Act that no specific exclusionary provision was found necessary.” Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. [id. At 682-683]

The exclusionary practice with respect to individuals found to be “managerial” rests on the premise that the functions and interests of such individuals are more closely allied with those of management than with production workers and, therefore, they are not truly “employees” within the meaning of the Act. Thus, the Board has found employee shareholders who are able to influence management policy by selecting members of the board of directors to be managerial. See Sida of Hawaii, Inc., 191 NLRB 194 (1971); and Florence Volunteer Fire Department, 265 NLRB 955 (1982) (firefighter members of a nonprofit fire company). See also Science Applications Corp., 309 NLRB 373 (1992).

In the instant case, the record reflects that the Employer’s Executive Board consists of the president, secretary-treasurer, recorder (recording secretary), and a number of vice-presidents. All of the representatives whose status is at issue except Holland have the title of vice-president. Holland bears the title of recorder.

The record reflects that union representatives and senior union representatives in the petitioned-for unit are required to be members of the Employer. The International Constitution and the Employer’s Bylaws provide that members of the Employer’s Executive Board have full and complete charge of all business of the Local Union not otherwise delegated to a specific officer or reserved to the membership. While the Employer’s president is given the authority to disburse the Local Union’s funds, such disbursements must be ratified by the Executive Board. Such disbursements include the wages and salaries of all individuals employed by the Employer. In this regard, the record reflects that the Executive Board approved the wage and benefits package contained in the last two collective-bargaining agreements covering the Employer’s clerical employees, and the wage and benefits package for union representatives implemented in October 2002.

While the President is given the authority to terminate the employment of any union representative, such authority is subject to an appeal to the Executive Board, which may reverse such a decision. In addition, the bylaws provide that the President’s disposition of a member’s grievance is subject to an appeal to the Executive Board.

In view of the foregoing, I find that the interests of the union representatives who are members of the Employer’s Executive Board are more closely allied with those of management than with those of the employees in the petitioned-for unit, and I will exclude them from the unit. See Retail Store Employees Union Local 428, 163 NLRB 431, 432 fn. 4 (1967) (employees who, as second vice president and recorder are members of Union’s executive board which passes upon the hiring and discharge of organizers and makes important policy decisions, found to be managerial employees); Retail Store Employees Union, Local 880, 153 NLRB 255, 259 fn. 9 (1965) (first vice-president and a member of the Local

Decision and Direction of Election
United Food & Commercial Workers Union,
Local 101, AFL-CIO, CLC
Case 20-RC-17811

Executive Council, which passes upon the hiring and discharge of business agents and organizers and formulates labor relations policies, excluded from the unit); Retail Store Employees Union Local 444, 153 NLRB 252, 255 fn. 7 (1965) (president, first vice president, guide trustee and business agents serving on executive board that passes upon appointments and discharges of business agents and organizers and formulate labor relations policies, excluded from the unit).

As I have found that union representatives and senior union representatives who are members of the Employer's Executive Board to be excluded from the unit as managerial employees, it is not necessary to reach the issue of whether they also are confidential employees.

177-2401-6750-0000
177-2401-6750-6700
177-8520-0100
177-8520-0800